BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 3774
National Republican Senatorial Committee and	)	
Stan Huckaby, as treasurer	)	

RESPONSE OF NATIONAL REPUBLICAN SENATORIAL COMMITTEE TO THE BRIEF OF THE OFFICE OF GENERAL COUNSEL

I. INTRODUCTION

Respondents respectfully urge the members of the Federal Election Commission ("Commission") to read the General Counsel's Brief ("Brief") in its fatiguing 109-page entirety. Reading that Brief will demonstrate a stale case, largely time-barred, still resting upon disjointed facts, and lacking a legal theory upon which a violation can be found, which originates from a theory that has been firmly rejected by three courts just since the Brief was written.

It is beyond argument that the General Counsel's lengthy quest for penalties in the 1992 and 1993 election cycles is now barred by the Statute of Limitations. It is equally true that the scant recitations concerning the soon-to-be-time-barred 1994 cycle lack any direct facts that could fairly lead to finding of a violation of the Federal Election Campaign Act ("Act") or the Commission's Regulations. *See, e.g.*, Brief at 90-107.[1]

This matter should be dismissed for three simple reasons evident from the General Counsel's Brief:

1) The Brief does not put forth sufficient facts to find a violation of the Act or Regulations. In particular, the Brief ignores that: other groups, not Respondents, made the communications alleged to have violated the Act; there is no allegation that any of the

[1] For example, the alleged violation in the 1994 cycle concerns payments to only one entity -- the National Right to Life Committee.

communications contained express advocacy; and, the Brief even concedes on page 105 that "there is no evidence that anyone at the NRSC had knowledge of the actual scripts used in the NRLC-financed phone banks." In fact, the Brief also concedes that " although the evidence is clear that the NRSC knew the funds would be used for GOTV activities for elections that included federal elections, in most instances it is not evident that the NRSC had knowledge of the specific content of the GOTV communications." *Id.* at 3 n. 2. Therefore, Respondents cannot be held to have violated the Act or Regulations.

2) Other than the discredited "totality of the evidence" argument, nothing in the Brief suggests a violation by the NRSC of any provision of the Act. The Brief does not contradict that:

- the NRSC had no control over the donations once they were made;
- the recipients were specifically instructed to not use the NRSC's funds to influence federal elections;
- it is not a violation for a political party committee to brief outside groups, including the media, about upcoming elections;
- even though it has been rejected as a valid legal theory, there is no evidence of improper coordination between the NRSC and the recipients of any contributions;
- the NRSC is permitted by the Act to make contributions to entities organized under section 170 (c) of the Internal Revenue Code ("IRC"); and
- a group organized under IRC section 501(c)(4) may publish non-partisan voter guides and conduct voter registration and get-out-the-vote activities.

3) The General Counsel's Brief lacks a valid legal theory against Respondents. Whether they term it "coordination", or "knowledge", or "contacts", the legal theory upon which the General Counsel bases its case has been consistently rejected by the courts. Indeed, three recent decisions completely invalidate the General Counsel's theories in this MUR: *FEC v. Christian Coalition*, *FEC v. Public Citizen* and *Republican Party of Minnesota v. Pauly.*

Further weakening its case, the Brief bases its argument that NRSC payment for the GOTV activities at issue should have been 65 percent federal dollars on an Advisory Opinion (AO 1995-25) written after the expenditures took place. *See* Brief at 3, n.2.

II. FACTS

The vast bulk of the charges in this brief stem from the 1992 and 1993 election cycles, and donations made by the NRSC to a variety of entities organized under IRC section 170(c). Factual support concerning the 1994 elections is, to be charitable, wanting.

As a national party committee, the NRSC is permitted to raise funds for both its federal and non-federal accounts. There is no rebuttal in the General Counsel's Brief to the NRSC's consistent contention that it may contribute funds from its non-federal accounts to a variety of non-partisan, non-profit organizations established under IRC section 501(c). The recipients of the NRSC's donations are entities exempt from taxation which are permitted to engage, and have a long standing history of engaging, in non-partisan voter education and registration activities, but may not influence federal elections. 26 U.S.C. § 4945.

Despite its 109 pages, the General Counsel's Brief leaves unrebutted a series of crucial facts that undermine its case: all of the non-federal funds at issue were solicited by the organizations who ultimately received the funds; the NRSC donated to these groups because it approves of each organization's overall positions and programs; and the NRSC has never asked for, or received, any guarantees that its donations would be used for any specific purpose, nor was there any specific understanding, let alone "joint venturing," of how the funds would be used by the recipient groups. In direct contradiction to the FEC's premise in this action, each NRSC donation is accompanied by a cover letter to the recipient

containing a specific directive -- that the funds cannot be used to influence any federal election.

This last fact is particularly important. It remains uncontroverted that the NRSC was as explicit as it possibly could be that its donations must not be used to influence federal elections. The NRSC policy was to send a cover letter with each donation stating that use of the NRSC money "in any way to influence a federal election is strictly prohibited." The NRSC policy concerning all of the donations at issue was to send them with a cover letter which contained language similar to those from the NRSC's then-general counsel, Edwina Rogers, which have been provided to the Commission:

> The National Republican Senatorial Committee routinely makes contributions to charitable and tax-exempt organizations such as the National Right to Life Committee. This contribution to your organization should be used for good government activities that are consistent with your organization's not-for-profit character. Please note that utilizing any of this money in any way to influence a federal election is strictly prohibited.

III. Legal Analysis

A. The Statute of Limitations Bars the Commission from Proceeding for the Enforcement of Penalties With This MUR.

The allegations surrounding the 1992 and 1993 election cycles must be dismissed as barred by the statute of limitations. As construed by the federal courts, the general five-year statute of limitations in 28 U.S.C. § 2462 applies to enforcement actions by the Commission. The Commission does not have the jurisdiction to proceed for the enforcement of penalties in this matter where the allegations raised relate to events that took place more than five years ago.

The Act does not contain an internal statute of limitations. *See FEC v. The Christian Coalition*, 965 F. Supp. 66, 69 (D.D.C. 1997).[2] Simply stated, the statute sets a fixed time period after which claims may no longer be asserted against a party. It precludes the Commission from commencing a "proceeding for . . . any civil fine [or] penalty" when five years have passed from the date the Commission's claims first accrued – when the acts or events at issue in the MUR first took place. *See FEC v. NRSC*, 877 F. Supp. 15, 18-19 (D.D.C. 1995) ("*NRSC*") (holding that the statute of limitations begins when the defendant commits his wrong or when substantial harm matures); *FEC v. The Christian Coalition*, 965 F. Supp. 66, 70 (D.D.C. 1997) ("In sum, the law of this Circuit is clear and the facts, as pled by the FEC, control: the FEC's cause of action accrued when the events at issue occurred. . . ."); *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) ("§ 2462 applies to FEC actions for the assessment of civil penalties, and that the limitations period begins to run at the time the alleged offense is committed") (citations omitted); *3M Company v. Browner*, 17 F.3d 1453, 1462 (D.C. Cir. 1994) ("*3M*") ("a review of [cases under § 2462] clearly demonstrates that the date of the underlying violation has been accepted without question as the date when the claim first accrued, and, therefore, as the date on which the statute began to run") (citations omitted); *FEC v. National Right to Work Committee, Inc.*, 916 F. Supp 10, 13 (D.D.C. 1996) (holding that the time period of limitations commences when the alleged offense is committed).

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[2] Therefore, the applicable statute of limitations is provided under 28 U.S.C. § 2462:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same time period, the offender or the property is found within the United States in order that proper service may be made thereon.

In the instant MUR, the primary events at issue occurred in 1992 and 1993, more than five years ago. General Counsel's Brief at 9.[3] As the Commission is well aware, it cannot engage in an open-ended investigation; rather, it must seek a rapid resolution of the matters before it. *See NRSC*, 877 F. Supp. at 18 ("The fundamental premise . . . is that it is inappropriate for a government regulator to wield the threat of an open-ended penalty.") (citations omitted). "This is particularly true in cases where the ongoing threat of penalties may disrupt core First Amendment political activities." *Id.* Given this passage of time, the danger exists that "evidence has been lost, memories have faded, and witnesses have disappeared." *NRSC*, 877 F. Supp. at 17 (citations omitted).

Thus, with respect to the allegations that occurred during the 1992 and 1993 time period, the Commission must dismiss the MUR and take no further action because the five year statute of limitations applicable to penalty actions under the Act has expired.[4]

B. General Counsel's Brief Cites No Valid Legal Authority.

1. NRSC Did Not Violate 2 U.S.C. § 441b

The Act prohibits corporations from making contributions and expenditures in connection with federal elections. 2 U.S.C. § 441b. But party committees such as the NRSC may establish a non-federal account to receive non-federal donations for non-federal purposes. 11 C.F.R. § 102.5(a)(1)(i). Since the NRSC is not incorporated, it can violate

[3] The General Counsel's Brief alleges non-federal payments to the American Defense Foundation in October and November of 1992 and again in March and May of 1993. *Id.* It also alleges non-federal payments to National Right to Life Committee in October and November of 1992 and again in October and November of 1994. *Id.* With respect to Coalitions for America, the General Counsel's Brief alleges non-federal payments in October and November of 1992. *Id.*

[4] Moreover, Respondent notes that the Commission is currently dismissing MURs it determines as "stale." For example, in a June 30, 1999 press release, the Commission announced the dismissal of Pre-MUR 353 against the Republican National Committee and Michael Kojima in connection with allegations arising during the 1992 election. In addition, in an August 27, 1999 press release, the Commission announced the dismissal of MUR 4877 against the Clinton/Gore '92 Committee, *et al.*, in connection with allegations arising during the 1992 election. Based upon these precedents, the Commission should treat the baseless

section 441b only if it deposits a prohibited contribution into its federal account. The NRSC correctly deposited all corporate contributions into its nonfederal account. In fact, under 2 U.S.C. § 441b a prohibited contribution occurs only if a party committee "knowingly" accepts or receives any prohibited corporate contribution, not if a party committee makes a permissible non-federal donation to an organization permitted to accept corporate funds. Thus, under the express wording of the statute, the NRSC did not violate section 441b.

Additionally, as the court made clear in FEC v. Christian Coalition, *slip op. 25-32,* violations of section 441b can only occur when the content of a communication contains express advocacy. There is no allegation or evidence in the General Counsel's Brief that any contribution by the NRSC at issue here contained express advocacy. There is no dispute that voter guides, voter registration drives and get out the vote calls are "about" or "relate to" federal elections. But those words are not the applicable legal standard; the standard is whether the communication "expressly advocates the election or defeat of a clearly identified candidate." Communications which list candidates, rate candidates, describe the positions of candidates and encourage people to register and go to the polls are not "express advocacy," and no express advocacy occurred here according to the facts presented in the General Counsel's own Brief.

2. Reliance on the Sole Court Case Cited by the General Counsel's Brief as Authority is Misplaced.

Reliance on FEC v. California Democratic Party, 13 F. Supp.2d 1031 (1998) is not valid. In addition to presenting an easily distinguishable set of facts, the court has only ruled on the California Democratic Party's motion to dismiss for failure to state a claim. There

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allegations contained in the instant MUR in the same manner by dismissing the MUR and taking no further action.

has been no judicial determination on the merits, and, therefore, this case cannot be used for the proposition cited in the Brief.

In addition, no matter how the courts rule on the merits, the facts make California Democrats inapplicable. Under the facts of the case, the California Democratic Party's ("CDP") monetary transfers went to a ballot initiative committee. After receiving solicitations, the CDP made periodic payments to the ballot committee, received weekly reports about the progress of their effort and kept the CDP and the campaigns of various candidates informed of the efforts. Several leaders of the recipient committee expressly advocated the defeat of a specific federal candidate while registering voters. CDP argued that since it did not itself conduct the voter registration drive, its contributions were not subject to the allocation regulations. The court denied this argument stating that "it is conceivable that these facts, if proved, could show that the voter registration drive was conducted on behalf of the CDP."

There is no such fact pattern here. The CDP never communicated a restriction on the usage of its contributions by the ballot initiative committee, the ballot initiative committee was not a long standing committee with its own its own ideology and adherents -- it was created for only one purpose, there was extensive direction of the efforts by the CDP and the benefiting campaigns, and some of the activity contained express advocacy. It is understandable that the General Counsel would attempt to rely on this case. But the CDP's activities do not mirror the NRSC's, and reliance on California Democrats is misplaced.

C. The General Counsel's Brief Fails to Even Address Three Recent Cases Vitiating The Legal Theory Upon Which Its Case Rests.

The slim reed upon which the FEC bases its case is the theory that "taken as a whole, the evidence shows more clearly that the NRSC made the non-federal payments with knowledge that they would be expended by the third party recipients for GOTV efforts

targeted to individuals likely to support Republican candidates in elections with federal candidates, and in some cases, with knowledge that the GOTV activities would be targeted to individuals likely to support Republican candidates in specific states or specific federal elections." General Counsel's Brief at 2-3. (emphasis added).

The Commission attempts to substitute "knowledge" for the discredited "coordination" standard. In either event, three recent court decisions have found permissible the actions and activity the Commission attempts to cast as impermissible here.

In *Christian Coalition v. FEC*, No. 96-1781, 1999 U.S.Dist. LEXIS 11971 (D.D.C. Aug. 2, 1999) [hereinafter "*Christian Coalition*"] the Commission attempted to recast voter guides by a non-profit group as impermissible expenditures on the grounds that the 501(c) group and some campaigns improperly shared information about the campaigns. slip op. at 41-42. These contacts included numerous political and strategic conversations with a candidate, his re-election campaign, official staff and the Republican National Committee and the NRSC. In that case, the head of the non-profit organization publicly endorsed the candidate's election and signed direct mail pieces on his behalf. Throughout the campaign, the non-profit group and the campaign traded strategic and other campaign-related advice. Members of the 501(c) group served as co-chairs of the campaign. Officials of the campaign were aware that the non-profit group was preparing to distribute a large number of guides which the Commission argued "would have the effect of causing a greater number of voters to go to the polls and vote for the [candidate] than would have gone in absence of the guides." slip op. at 41-51.

In *Christian Coalition*, as in this MUR, the Commission argued that the communications by the non-profit groups were tainted by the amount of contact (whether "coordination" or "knowledge") between the group and the campaign. Significantly, in both

instances, while the Commission conceded that none of the communications contained "express advocacy" it still argued that the communications were produced in conjunction with the candidates and should therefore be treated as prohibited corporate contributions. slip op. at 58-59. The specific types of contacts included, as here, allegations that staff members of the non-profit knew of the campaign's plans. In *Christian Coalition*, the charges also included the sharing of lists between the non-profit and the campaign, as well as jointly conducted strategy sessions.

In recognizing that there could be so much contact between a non-profit group and a campaign to taint the expenditure, the court ruled that the standard for limiting contacts must be restrictive, so that the universe of cases triggering potential enforcement actions is reduced to those situations in which the coordination is extensive enough to make the potential for corruption through legislative quid pro quo palpable, without chilling protected contact between candidates and corporations and unions. slip op. at 94. The General Counsel's Brief here does not come close to meeting this judicially established standard.

In setting out what sorts of conversations between the entities would render subsequent communications impermissible, the *Christian Coalition* court laid out a standard of activities which are neither alleged nor present in MUR 3774. "In the absence of a request or suggestion from the campaign, an expressive expenditure becomes 'coordinated' where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure,

but the candidate and spender need not be equal partners." slip op. 99-101. No such evidence exists here.

Drawing from this opinion, improper coordination or knowledge to taint voter guides would have to include discussion or negotiation over the contents of the guide and discussion of which issues are to be included in the candidate survey, or the phrasing of the questions. For get-out-the-vote drives, an expenditure could be impermissible if the discussion or negotiation included (1) the contents of the script; (2) when the calls were to be made; (3) the "location" or audience, including discussion of which databases were to be used; or (4) the number of people to be called. slip op. 102-104. This did not happen in MUR 3774, not even according to the General Counsel's Brief.

As applied to the NRSC in *Christian Coalition*, the court failed to find coordination despite contacts between the NRSC and the Coalition. Beginning in 1990, the NRSC sought a meeting with Coalition officials to discuss coalition development in key Senate races. *Id.* at 76. At the close of a meeting in which the NRSC briefed the Coalition on key Senate races, the NRSC suggested that it make a donation to the Coalition in support of its voter guide project. *Id.* at 77. However, the NRSC explicitly stated that it could not "direct the nature of the activities or the places at which they occurred." *Id.* In response, the Coalition informed the NRSC that the voter guide project would go forward with or without the donation and that the distribution would take place in states that the NRSC identified and those that it did not identify. *Id.* Subsequently, the NRSC made a donation to the Coalition which, in turn, moved forward with the voter guide program. *Id.* Based upon these facts, the court held that these activities did not rise to the level required for a finding of coordination. *Id.* at 113-14. The court stated: "[a] corporation's expressive expenditure

becomes an illegal contribution when the candidate, or in this case the party committee, becomes a partner in the corporation's speech." Id. at 114.

Moreover, the *Christian Coalition* court looked at a range of behavior and found none of it to render the communications the improper contribution the FEC alleged. Those specific acts raised by the FEC and rejected by the court included: repeated reminders by the group that it would distribute many voter guides and make GOTV calls; and attendance by a candidate at a fundraising event of the group that may have been designed to raise the funds to pay for the very activities the Commission alleged helped the candidate. slip op at 105, 107 ("The mere fact that the Coalition was singing from the same page as the Bush campaign on certain issues does not establish coordination"). Crucial is that the campaign did not request or suggest that the non-profit group make certain expressive expenditures. In fact there was no candidate involvement at all.

The court also consistently rejected a "knowledge" standard, such as the one suggested by the General Counsel's Brief in MUR 3774, based upon the 501(c) group's knowledge of a campaign's private opinion polls, slip op. at 109, 110, or private strategic information, slip op. at 111, or insider knowledge about a campaign because of a staffer's dual position. slip op. at 113.

The case of *FEC v. Public Citizen*, 1:97-CV-358-RWS (U.S. Dist. Ct., ND GA 1999) is likewise instructive. In that case, the Commission attempted to recast a 501(c)'s expenditures as contributions to a federal political committee on grounds virtually identical to the "coordination" or "knowledge" theory the General Counsel's Brief employs in MUR 3774. The court rejected the Commission's theory in *Public Citizen*, and the Commission needs to take the same action here.

Under the facts of that case, the 501(c) group engaged in independent expenditures against a specific federal candidate. Subject to the strict "coordination" standard of 2 U.S.C. § 431(17) (which the Commission has attempted to apply to speech such as that in MUR 3774, despite no regulatory authority to do so), the 501(c) nonetheless asked one of its consultants to contact the campaign involved. The consultant obtained a press kit, information about the candidate's intentions and his position on campaign finance reform from the campaign manager, and passed this information on to the Treasurer of the 501(c). The consultant continued to communicate with the campaign and report back to the Treasurer of the 501(c) even after the commencement of the independent expenditure effort. These conversations included discussions about activities of the candidate's primary opponent and recommendations of mail vendors. The 501(c) entity paid for television advertisements and direct mail communications urging the defeat of a clearly identified candidate and reported the expenditures to the FEC. However, at all times, the Treasurer was careful to avoid direct contact with the campaign and to not use non-public information obtained from the campaign. Further, the benefiting campaign was not aware of the content of the advertisements until they were aired.

Despite these contacts and the "knowledge" gained from them, the court ruled that they did not taint the expenditure and render the communications a "contribution" under the Act. slip op. at 15-17. In reaching this conclusion, the court found that the communications between the campaign and the consultant were information also being disseminated to the public. Further, there was no evidence that the campaign took part in creating the ad or other materials and did not play a role in deciding when the 501(c) would publish its materials. The court rejected the Commission's argument that the 501(c)'s efforts

to avoid the appearance of coordination by using a consultant to obtain the information was evidence of their knowledge of their wrongdoing.

Similarly, in MUR 3774, the discussions between the NRSC and the non-profit organizations were largely about information available to the public or within the public knowledge. The fact that these organizations engaged in voter turn out activity was public knowledge. The states with the most hotly contested elections (sometimes including Senate races, sometimes not) were public knowledge. The states where the NRLC had the most members were public knowledge. Neither the NRSC nor any candidates participated in creating any of the communications and played no role in the time, place and manner of which these communications occurred.[5] The NRSC simply provided funds to like-minded organizations to support their efforts, with strict instructions that they not be used to influence any federal elections.

A third case, *Republican Party of Minnesota v. Pauly*, "D.C. Minn., No. 98-CV-1698,9/17/99 ("*Pauly*"), provides additional evidence that the General Counsel's theory in MUR 3774 is fatally flawed. In *Pauly*, the United States District Court in Minnesota struck down an attempt to use a state statute to restrict the "coordination" permissible between a party committee running independent expenditures for its candidates with those candidates.

With respect to the issue of coordination, the court held that the contacts between the RPM and its candidates did not rise to the level of coordination. Specifically, the court stated:

> The record in this case is replete with examples of cooperation between the RPM and its endorsed candidates. The RPM often provided administrative and strategic support to the candidates. The party coordinated candidate appearances and voter registration drives, and helped to recruit volunteer assistance. RPM officials conducted 'issue research' 'develop[ed] campaign plans,' and provided candidates with donor lists from which to solicit campaign contributions. However, the record

[5] One such communication referenced only the presidential election. Brief at 51.

in this case provides no support for an inference of actual coordination in conducting independent expenditures.

slip op. 14-15 (emphasis added). The court rejected the government's efforts to merely "label" an activity coordination and held that the government must produce evidence of actual coordination. *See id.* at 15 ("To the contrary, the evidence at record here evinces a calculated attempt by the RPM and its candidates to maintain a "wall" when it comes to spending decisions") (citations omitted).

The *Pauly* court ruled that a degree and level of contact not approached by the NRSC in this MUR did not rise to the level of coordination. The NRSC made a donation to the 501(c) organizations with an explicit directive the donations may not be used to influence any federal elections. The fact that these organizations engaged in voter turn out activities was public knowledge. The NRSC did not participate in the creating any of the communications and played no role in the strategic decisions concerning where, when and how the communications should occur. In sum, the NRSC's activities did not rise to a level of impermissible coordination in connection with the organizations' communications.

IV. DISCUSSION

It is axiomatic that the General Counsel's burden is to show that the activity undertaken by Respondents violates the Act or Regulations. The Brief fails to meet this threshold test. *See FEC v. MCFL* , 479 U.S. 338; *Faucher v. FEC*, 743 F. Supp. 64 (D. Me. 1990), aff'd 928 F. 2d 468 (1st Cir. 1991), *cert. denied* 112 S. Ct. 79 (1991); *FEC v. National Organization for Women*, 713 F. Supp. 428 (D.C.C. 1989). This Commission's notion that it can proceed without specifically stating any actual violations or articulating its reasons for a decision (other than an apparent feeling for the "totality" that something must be wrong) has met with disfavor by the courts. *E.g.*, *FEC v. NRSC*, 966 F.2d 1471 (D.C. Cir. 1992)

(citing need in enforcement proceedings for explanation of Commission's reasons for acting); *Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987 (need for Commissioners to provide statement of reasons for their votes); *FEC v. Ted Haley Congressional Committee*, 654 F. Supp. 1120 (W.D. Wash. 1987), *rev'd on other grounds*, 852 F.2d 1111 (9th Cir. 1988) ("thoroughness, validity, and consistency of an agency's reasoning" are important factors to be considered by the court); *see also, Common Cause v. FEC*, 676 F. Supp. 2286 (D.D.C. 1986). In addition to lacking valid legal authority, the Brief falls far short in terms of producing any set of facts that result in a violation of the Act or regulations.

A. GENERAL COUNSEL'S BRIEF FAILS TO REBUT THAT ALL NRSC ACTIVITIES WERE PERMISSIBLE UNDER THE ACT.

The General Counsel's Brief not only fails to show activity by Respondents that violates the Act or Regulations, it fails to rebut the central contention of Respondents' case – that each and every one of its activities was permissible under the Act.

1. The NRSC May Make Non-Federal Donations to 501(c) Groups.

The General Counsel's Brief rests on an unsubstantiated allegation that payments by the NRSC's non-federal account to non-partisan, non-profit 501(c)(3) and (4) groups were impermissible. Yet, the Brief fails to contradict the NRSC's contention that the Act and Regulations do permit a political party committee to contribute to non-partisan, non-profit groups established under the Act. *See* 2 U.S.C. § 439a. There is no proscription in the Act or regulations on the timing, amount or purpose of such a contribution.

Further, the General Counsel's Brief does not rebut two crucial facts surrounding the contributions at issue. First, there were no strings attached as to how the donations were to be used – the NRSC had no control over the ultimate use of the funds it donated. The Brief sites no evidence that the NRSC attempted to control how these funds were used. In fact,

NRSC officials knew that they had no control over what use these groups made of the donations, nor recourse if they did not like the use.[6]

Secondly, the Brief fails to address the strict prohibition to the groups in the NRSC's cover letters to the contributions that these funds were not to be used to influence federal elections. This prohibition is crucial to understanding that these contributions were not, and could not have been, what the Brief tries to make them out to be.

2. A Political Party Committee May Brief Outside Groups, Including the Media, on the Upcoming Elections.

The General Counsel's Brief does not question the NRSC's contention that a core function of a political party committee is briefing any and all groups and individuals who wish information about the upcoming elections. These briefings, conducted routinely by both parties' committees, generally discuss all the races and naturally center on which elections will be the closest. These briefings are hardly secret. The same briefing given groups, PACs and individuals is also given to members of the media so that the party's position on events will be disseminated as widely as possible. The recipient groups would have been welcome at one of these NRSC briefings, or could have learned of their contents from public media reports. There is no allegation in the Brief that suggests any of the recipient groups, and especially the National Right to Life Committee in 1994, received anything but the information disseminated at these briefings.

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[6] The donations at issue were made to groups whose philosophy was compatible with the Republican Party's platform and were sent with the explicit instruction that the funds not be used to influence any federal election. Their purpose was to reinforce the groups' long standing efforts. Contrary to some initial, inaccurate, off-the-cuff comments at a press lunch, what actually happened was permissible under the Act and regulations. *See* Ruth Marcus, GOP Donation Aided Right to Life Group, Washington Post, February 12, 1995 at A27. The initial comments by Senator Gramm, which he promptly corrected, are insufficient grounds upon which to base a probable cause finding and are wholly inadequate to satisfy the Commission's burden of proof that a violation occurred. The FEC cannot make its case solely on the original article and ignore both the correction by Senator Gramm and his sworn affidavit.

3. A 501(c)(4) May Publish Non-Partisan Voter Guides and Conduct Voter Registration and Get-Out-The-Vote Activities.

The General Counsel's Brief fails even to allege that the ultimate uses of the funds violated the Act or Regulations. Indeed, the activities that the Brief alleges were undertaken with the NRSC's funds are all protected under a series of United States Supreme Court and Court of Appeals cases recognizing the right of groups such as those named in this matter to use corporate expenditures to publish non-partisan voter guides and conduct non-partisan voter registration and get-out-the-vote drives. *See FEC v. MCFL*, 479 U.S. 238; *Faucher v. FEC*, 928 F.2d 468.[7] Those cases have also established that the Commission does not have the authority to restrict issue advocacy; it may only restrict express advocacy. *MCFL*, 479 U.S. at 249; *Faucher*, 928 F.2d at 470.

While the Commission has proposed a change in the regulations to bar improper "coordination" between the non-partisan groups and candidates or their agents, those regulations are still proposed. Accordingly, there is no bar to such conversations at the present, and there certainly was no bar during the election cycles at issue in this MUR.

B. THE GENERAL COUNSEL'S BRIEF FAILS TO ALLEGE ANY FACTS THAT WOULD CONSTITUTE A VIOLATION OF THE ACT OR REGULATIONS.

The General Counsel, after three years of investigation, has produced no facts that would constitute a violation of the Act or Regulations. An analysis of the Brief indicates that the only payments at issue which are not barred by the statute of limitations are $175,000 in four donations to the National Right to Life Committee ("NRLC"). As the Brief itself admits, the original theory of improper "coordination" is no longer valid. Brief at 2.

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[7] In *FEC v. Christian Action Network*, 1995 WL 416309 (W.D. Va. 1995), the court noted that the *Buckley* court's ruling was adopted to avoid a "semantic dilemma" in dealing with the issue of what constitutes express advocacy. "Thus, courts have been disinclined to entertain arguments made by the Commission that focus on anything other than the actual language used...." *Id.* at *5. Certainly, in this matter, the Brief never even tries to address that any relevant activity comes close to meeting this standard.

But rather than admit that a series of court decisions has vitiated the Commission case, the General Counsel's Brief changes the wording, but not the meaning, of its theory of the case against the Respondents. Rather than use the word "coordination," the Brief now rests upon a "knowledge" standard, that except for the name is the same theory discredited by the *Christian Coalition*, *Public Citizen* and *Pauly* decisions. The crux of the General Counsel's theory remains that the NRSC had "knowledge" that its non-federal payments would likely be expended to motivate through GOTV activities "individuals likely to support Republican candidates" in elections with federal candidates in specific states or specific federal elections. Brief at 2-3. As proof of this illegal "knowledge", the Brief cites a series of conversations and meetings, that are precisely the contacts that were found not to have tainted the expenditures in *Christian Coalition*, *Public Citizen* and *Pauly*.

In addition, the Brief makes a telling (but no doubt accidental) admission that undercuts even its unsupportable "knowledge" standard. In discussing the allegedly damning 1994 contacts between the NRSC and the NRLC, the Brief at 105 states:

> Although there is **no evidence** that anyone at the NRSC **had knowledge** of the actual scripts used in the NRLC-financed phone banks, NRLC Executive Director David O'Steen testified that it was **generally known** that NRLC conducted 'nonpartisan' GOTV phone calls. (emphasis added)

This is a shocking statement. First, it admits that the NRSC had no knowledge of what was being done with its contribution. Secondly, it attempts to recast a series of conversations and meetings – the very definition of what is permissible "coordination" in the case law – into some sort of improper conduct. And, lastly, it appears that an otherwise permissible contribution can be rendered improper on the basis of information that is "generally known." Cf., *Christian Coalition* at 109-113; *Public Citizen* at 15-17; *Pauly* at 14-15.

In other words, the conversations upon which the General Counsel pins its evidence of improper "knowledge" are precisely the conversations permitted by the courts in *Christian*

Coalition, *Public Citizen* and *Pauly*. The key to the impropriety of all the NRSC's payments to the non-profit entities, according to the General Counsel's Brief, was that the NRSC's payments "were preceded by meetings and phone calls between the organizations. In an early 1994 meeting, the NRSC gained information about the NRLC's general operations and about the 1994 Senate candidates in which NRLC was interested." *Id.* at 91.

Of course, it is just this sort of general information exchange that the courts permit.

The Brief even further undercuts its own argument. First, it states that an NRSC official and an NRLC official both remembered a meeting, probably before June 1994, that "discussed Senate races and NRLC's operations generally." Brief 91-92. But just two paragraphs later, the Brief concedes: "Neither [of the two officials] recalled particular Senate races discussed." Brief at 92.

The General Counsel's Brief also makes much of the role of political party operatives who served as liaisons with groups a part of the Republican coalition. Yet the Brief ignores a similar factual charge brought by the Commission in *Christian Coalition* involving the NRSC and the same individuals here which was soundly rejected by the court. In *Christian Coalition*, as in this MUR, the operative had contact with the 501(c) entity that engaged in GOTV activities. In both cases, the NRSC contributed funds to the 501(c) group for GOTV communications. As in the court case, the NRSC made a contribution that could have gone to GOTV communications, "but it did so explicitly acknowledging that it could not become a partner in that speech [i.e. the transmittal letters in MUR 3774] by discussing contents or points of distribution. It is possible that the Coalition could be viewed as having donated a 'service' to NRSC (converting its funds into voter guides) in violation of 441b(a). But that would be a troublesome interpretation of 'service.' " slip op. at 113. Since there is no question that the NRSC fully reported its contributions to the NRLC, there is no

"anonymity premium", slip. op at 114, and the General Counsel's theory must fail in this MUR as it did in *Christian Coalition*.

The other conversations cited by the Brief are ones that party committees do and should have all the time with their supporters and allies. Despite the lengthy recitation, the Brief fails to explain how a violation can occur since: the NRSC had no control over the funds it contributed; there is absolutely no evidence that the funds were sent to any non-profit on behalf of any candidate, and the ultimate activity did not involve express advocacy.

The Brief never explains how contributing funds to a non-profit entity, as permitted in the Act, when the NRSC has no control over how the funds were spent can violate the Act. There is, of course, no evidence that the NRSC ever received any guarantee that its money would be used for a particular purpose. And there is no evidence that the NRSC had any recourse if the group used its money for any purpose it wished.

Similarly, the Brief does not provide any evidence that the funds were earmarked for any particular election. The cover letters to the NRSC contributions all said that the funds could not be used to influence any federal election. And the Brief fails to address the simple fact that there were other statewide and local elections in both Pennsylvania and Minnesota in 1994 (including contested Governor's races) and that the funds, even if used for GOTV purposes, were not geared in any way, shape, manner or form to the Senate candidates.

Nor is there any proof offered by the Brief that the ultimate disposition of the NRSC's contribution resulted in express advocacy. Without express advocacy, there can be no violation.

C. Reliance on A Corrected Newspaper Article is Not Valid.

The Commission also attempts to hang its theory on the "off-the-cuff" statements of Senator Gramm at a lunch with reporters, statements which Senator Gramm corrected

within hours of the luncheon when he realized his statements were in error. Despite Senator Gramm's "incorrect" statements, the actual facts remain uncontroverted -- the donations in question were permissible donations from the NRSC's non-federal account to non-partisan, non-profit organizations. The donations were made to groups whose philosophy was compatible with the Republican Party's platform and were sent with the explicit instruction that the funds not be used to influence any federal election. Since the donations were sent without any conditions, their purpose was to strengthen the groups generally and to reinforce the groups' overall non-partisan activities and message. NRSC Response to FEC Interrogatories ¶¶ 2c, 2d; Ruth Marcus, GOP Donation Aided Right to Life Group, Washington Post, February 12, 1995 at A27. To reach its "inference" of a violation, the Commission chooses to ignore the clearest fact in the entire matter -- the cover letters which as a matter of policy accompanied each donation and stated explicitly that the funds not be used to influence any federal election.

V. CONCLUSION

For the foregoing reasons, the Commission should take no further action on this Matter and dismiss it.

Respectfully submitted,

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